(86)

No. 84-495

In the Supreme Court of the United States
October Term, 1984

Richard Thornburgh, H. Arnold Muller, Helen B. O'Bannon, Michael I. Browne, William R. Davis, LeRoy S. Zimmerman, personally and in their official capacities, and Joseph A. Smyth, Jr., personally and in his official capacity, together with all others similarly situated,

Appellants

v.

American College of Obstetricians and Gynecologists, Pennsylvania Section, Henry H. Fetterman, M.D., Thomas Allen, M.D., and Francis L. Hutchins, Jr., M.D. on behalf of themselves and all others similarly situated; Allen J. Kline, D. O., on behalf of himself and all others similarly situated; Brooks R. Susman, Paul Washington; Morgan P. Plant, on behalf of herself and all others similarly situated; Elizabeth Blackwell Health Center for Women, Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counseling Center; and Women's Health Services., Inc.,

Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

Brief for an Ad Hoc Group of Law Professors as Amici Curiae in Support of Appellees

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v.

Allan G. Charles, et al., Appellees

On Appeal From the United States Courts of Appeals for the Third and Seventh Circuits

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Brief for an Ad Hoc Group of Law Professors As Amici Curiae in Support of Appellees

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CONSENT OF PARTIES

Amici curiae file this brief with the consent of all the parties in support of the position advanced by the appellees.

INTEREST OF AMICI CURIAE

Amici Curiae are the individuals listed who compose an ad hoc group of professors teaching at various American law schools. The group represents a cross section of views and diverse interests. Amici all recognize the importance and emotional timbre of the issues raised in this case. They, however, believe that these issues should not be resolved at the expense of impugning the integrity of the federal judicial process simply because of the zealousness and fervor surrounding their public debate. Amici recognize and support the logical and orderly procedural flow of litigation, as well as adherence to constitutional requirements for the exercise of appellate jurisdiction. Amici, therefore, urge this Court to dismiss these cases for lack of jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than a decade has passed since this Court's land-mark decision in Roe v. Wade, 410 U.S. 113 (1973) (hereafter Roe) articulated the fundamental constitutional protection of a woman's right to obtain an abortion. In the intervening years, this Court consistently has reaffirmed its position in a succession of cases challenging the practical application of the tenets of Roe.[1] These two cases once more appear to question this Court's strength of conviction in its interpretation of Roe in several

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[1] See Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Poe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981).

recent similar decisions.[2] This appearance, however, is deceptive and illusionary. Both of these cases are improperly before this Court. Appellants have failed to satisfy fundamental requirements necessary for the exercise of appellate jurisdiction by this Court.

In Thornburgh, appellants, in their zeal, seek to disrupt the logical and orderly procedural flow of litigation by having this Court abandon the century long practice of restricting review on appeal from a Circuit Court of Appeals decision to only those cases involving final judgements. In addition, because of intervening circumstances, that specific part of the appeal seeking review of the Parental Consent/Judicial Approval provi-

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2/ Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

sions, §3206 of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Am. §§3201-3220 (Purdon 1983) (hereafter the "Pennsylvania Act") presently is moot as a matter of appellate review and ripe for review by the District Court.

Similarly, in Diamond, there is no live case or controversy for the exercise of federal judicial power. Appellants, District Court intervenors, lack the requisite standing necessary to bring the case to this Court. The District Court order granting appellants the right to intervene in the first place is not dispositive of whether they now have standing. None of the originally named party-defendants, governmental officials representing the State of Illinois, have filed an appeal or adopted appellants' brief in this case. In fact, all of the state representatives have been realigned as appellees in the case before this Court.

I. TRADITIONAL PRINCIPLES OF FINALITY OF JUDGMENTS REQUIRE DISMISSAL OF THE APPEAL UNDER 28 U.S.C. §1254(2) OF PART OF AN INTERLOCUTORY ORDER ISSUED BY THE CIRCUIT COURT OF APPEALS IN THORNBURGH

This case was brought to the Circuit Court of Appeals on cross-appeals from a District Court order, entered on a hastily stipulated record, denying a substantial, but not total, part of plaintiff's request for a preliminary injunction of the Pennsylvania Act. The case was twice briefed, as well as orally argued. In between, this Court announced its decisions in three factually similar cases, Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983), Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)and Simopoulos v. Virginia, 462 U.S. 506 (1983). After thoughtful and methodical consideration, the Circuit Court of Appeals finally concluded that certain

sections of the Pennsylania Act were unconstitutional as a matter of law as written. The original denial of the preliminary injunction was reversed in part and the case was remanded to the District Court "for further proceedings in accordance with [its] opinion." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 304 (3rd Cir. 1984). Judgement was not entered for the plaintiffs. Significant parts of the Pennsylvania Act still require District Court review during which both plaintiffs and defendants may engage actively in trial litigation by offering additional evidence and legal arguments. The Commonwealth of Pennsylvania has not appealed certain issues but reserved them for further litigation before the Distict Court. (E.g. §3205(a)(2) of the Pennsylvania Act.) Since the Circuit Court of Appeal's order, plain-

tiffs have renewed their motion before the District Court for a preliminary injunction of additional provisions of the Pennsylvania Act. A full evidentiary hearing has been held and a final hearing on the merits should be scheduled shortly. The District Court decision on these and other matters undoubtedly will be appealed to the Circuit Court of Appeals and, probably, to this Court, as well.

The complicated and fragmented procedural posture of the case, argues in persuasive decibels, that the interlocutory order of the Circuit Court of Appeals clearly lacks the degree of finality required for the exercise by this Court of mandatory appellate jurisdiction under 28 U.S.C. §1254(2) (hereafter §1254(2)).

This Court consistently has required that appeals can be taken only from final judgments of the Circuit Court of Appeals to the United States Supreme Court.

> Under the Act of February 13, 1925 [the Amended Judicial Code of 1925], §240(b) [the predecessor to §1254(2)] appeals to this Court from Circuit Court of Appeals lie only from final judgments or decrees in cases where the validity of a state statute is drawn in question on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is against its validity. (citations omitted)

Slaker v. O'Conner, 278 U.S. 188, 189-190 (1929). This finality requirement was read directly into §1254(2) in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). Neither case has been overruled and clearly are controlling precedent here.[3]

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[3]/ Neither New Orleans v. Dukes, 427 U.S. 297 (1976), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), El Paso v. Simmons, 379 U.S. 497 (1964) (per curiam) nor Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77 (1958), reached the merits of the issue presently before the court. In any event, all four cases are factually distinguishable.

It is neither surprising nor confusing that §240(b) of the amended Judicial Code of 1925 and 28 U.S.C. §1254(2) contain no explicit finality language. The final judgement requirement within the federal court system finds its historical roots in the practice of the common law in the courts of England[4] and in the first Judiciary Act of 1789, 1 Stat. 73, c. 20 §22. Finality has been deemed a longstanding rule of procedural practice implicit in all prior acts of Congress, equally silent in their terms on this matter, related to United States Supreme Court appellate jurisdiction. See generally, Crick, The Final Judgement as a Basis for Appeal, 41 Yale L.J. 539 (1932). When the

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4/E.g. Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615); U.S. v. Girault, 52 U.S. 22 (1850); Holcombe v. McKusick, 61 U.S. 552 (1857).

Circuit Courts of Appeal were created by the Evarts Act of March 3, 1891, 26 Stat. 826, this Court reaffirmed in clear and unmistakable terms the applicability of the final judgement requirement for access to the United States Supreme Court by appeal.

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error,... have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 6 How. 201, 204. The Construction [of non-finality] contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed. . . .
> . . .[T]he distribution of the entire appellate jurisdiction of our national judi ial system, between the Supreme Court of the United States and the Circuit Court of Appeals, . . . by designating the classes of cases in respect of which each of those two courts

shall respectively have final jurisdiction. . . . [T]here is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word final . . . should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, ... to this court, independently of any final judgment upon them. The

> effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, ... by awaiting the final judgment, could be promptly decided in one appeal.

McLish v. Roff, 141 U.S.661,665-667 (1891).

§1254(2), as originally enacted as §240(b), was an amendment to the Judge's Bill of 1925 drafted by Justices deeply concerned about the U.S. Supreme Court's caseload. John Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 299 n.7 (Fall, 1978), James F. Blumstein, The Supreme Court's Jurisdiction - Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 898-899 (1973); F. Frankfurter and J. Landis, The Business of the Supreme Court, 273-278 (Johnson Reprint Corp., N.Y. 1972). §240(b) was a Senate compromise measure designed to place circuit courts of

appeal and state courts, pursuant to §237(a), 43 Stat. 937 (now 28 U.S.C. §1257(a)), in "perfect parity, allowing a writ error from the circuit court of appeals under conditions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." Frankfurter and Landis, supra. at 278 (citing Sen. Walsh, 66 Cong. Rec. 2923); see also Simpson, supra. at 313. While §237(a), directed to state courts with varying appellate practices, explicitly required finality, §240(b) merely reflected codification of historical federal court practice.[5]

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[5]/ This comparison is not intended to imply any other similarity of requirements under these statutes.

The finality requirement, for some time, has served as one of a number of measures aimed at relieving the burden of the Supreme Court caseload by reducing the number of cases requiring mandatory appellate review. Congressional policy has been to restrict the mandatory appellate jurisdiction of the U.S. Supreme Court.[6] This Court has recognized

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6/ The Evarts Act, Act of March 3, 1891, 26 Stat. 826, established the federal Circuit Courts of Appeal and U.S. Supreme Court certiorari authority over certain cases. The Act of September 6, 1916 Ch. 448, 39 Stat. 726, provided a right of appeal to the U.S. Supreme Court from state court only where a federal statute, treaty, authority or right was struck down or a state statute upheld against federal challenge. The Act of February 13, 1925, Ch. 229, 43 Stat. 936, the Judge's Bill of 1925, widely substituted certiorari review for a significant part of U.S. Supreme Court mandatory appellate jurisdiction. The Act of August 12, 1976, 90 Stat. 1120, by repealing 28 U.S.C. §§ 2281, 2282 and 2403, abolished direct appeals to the United States Supreme Court from most three-judge district courts.